

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 5, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2610

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

ROSA J. VASQUEZ,

Plaintiff-Appellant,

v.

**WILLIE HENDERSON and
GERMANTOWN MUTUAL INSURANCE COMPANY,
A DOMESTIC INSURANCE CORPORATION,**

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Rosa J. Vasquez appeals from a judgment dismissing her complaint, which pled only a common law negligence theory alleging that Willie Henderson's dog bit her causing severe injuries. Vasquez claims that the trial court erred by dismissing her claim at the close of her case-in-chief because, even though she had not proven common law negligence, the

evidence supported a claim under the strict liability doctrine codified at § 174.02, STATS. Accordingly, Vasquez argues that the trial court erroneously exercised its discretion in denying her motion to amend the complaint to add the strict liability claim. Because the trial court did not erroneously exercise its discretion, we affirm.

I. BACKGROUND

Vasquez alleged that she received injuries as a result of a dog bite, which occurred on February 20, 1992, at Henderson's home. Although Henderson was not home at the time of the incident, Vasquez came to his home to pick up Henderson's girlfriend, Yvonne Trevino, for a birthday dinner. Vasquez entered the fenced-in yard by opening the gate. As she was knocking on the windows and door, she was allegedly attacked by the dog, which was in the fenced-in portion of the yard.

Vasquez filed suit, alleging a common law theory of negligence. The complaint did not reference a strict liability theory or § 174.02, STATS. The case was tried to the court because Vasquez failed to timely pay the jury fee. In her case-in-chief, Vasquez was the only witness, as no other witnesses were named in accordance with the scheduling order. At the close of her case-in-chief, Henderson moved to dismiss. Vasquez, through her attorney, admitted that they had not proven that Henderson was negligent. Vasquez moved the court to amend her complaint to add a claim of strict liability.

The trial court denied the motion to amend the complaint and granted the motion to dismiss. Vasquez now appeals.

II. DISCUSSION

Vasquez does not dispute that she failed to prove common law negligence. Hence, unless the trial court allowed her to amend her complaint to add a claim for strict liability, dismissal was appropriate. The pivotal question, therefore, is whether the trial court erroneously exercised its discretion in refusing to allow the amendment.

A trial court properly exercises its discretion if it applies the proper law to the relevant facts and reaches a reasonable conclusion. *Village of Shorewood v. Steinberg*, 174 Wis.2d 191, 204, 496 N.W.2d 57, 62 (1993). Our review of the record reveals that the trial court did not erroneously exercise its discretion.

Section 802.09, STATS., sets forth the law governing amendments to the pleadings. This statute provides in pertinent part:

- (1) AMENDMENTS. A party may amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order under s. 802.10. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires.

- (2) AMENDMENTS TO CONFORM TO THE EVIDENCE. If issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining the action or defense upon the merits.

As the trial court properly explained, neither subsection requires an amendment under the facts presented in the instant case. Subsection (1) provides that amendment should be allowed “when justice so requires.” After examining the relevant facts, however, the trial court reasoned that justice did not require it to grant the motion to amend. Vasquez had ample time to amend her complaint as a matter of right – within six months of filing suit or within the time set forth by the scheduling order. She did not. Further, on the date of the trial, Henderson's counsel clearly stated that this case involved solely a common law negligence allegation and was *not* premised on a strict liability theory. Vasquez did not object to, clarify, or respond to that representation. Accordingly, she waived her right to claim otherwise on appeal. See *State v. Fawcett*, 145 Wis.2d 244, 256, 426 N.W.2d 91, 96 (Ct. App. 1988) (failure to object at trial in general waives any possible objection for purposes of appeal).

Subsection (2) of the amendment statute allows for “freely amending the pleadings to conform to the evidence.” However, this applies only where the opposing party allows the non-pled theory to be tried, either expressly or impliedly. Clearly, Henderson did not expressly or impliedly concede to a trial involving a strict liability theory. His representation at the beginning of trial, referenced above, demonstrated his objection to a trial on anything but the common law negligence theory.

Moreover, the trial court examined the prejudice that would result to Henderson should the motion to amend be granted. It concluded that granting the motion to amend “would place a great injustice upon the defendant.” The trial court's reasoning demonstrates a rational process. Vasquez did not provide any notice in her pleadings that she intended to proceed on a strict liability theory. Vasquez acquiesced on the record that this case involved only a common law negligence claim and not a strict liability claim. It was not until her common law negligence claim was foreclosed, due to her failure to prove that Henderson was negligent, that she raised the strict liability issue. Under these circumstances, prejudice to Henderson is undeniable.

Based on the foregoing, we cannot conclude that the trial court's determination was an erroneous exercise of discretion. The trial court examined the relevant facts, applied the proper law, and reached a reasonable conclusion.

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.